No. 87-1356

In The
Supreme Court of the United States
October Term, 1987

MATTER OF THE GUARDIANSHIP OF PEARL C. POSEY, ADULT INCOMPETENT, RAYMOND HARKRIDER, RAYMOND HARKRIDER AS EXECUTOR OF THE ESTATE OF GEORGIA CORY, DECEASED, BETTY ROGERS and JUNE NELSON,

Petitioners,

v.

LAFAYETTE BANK AND TRUST COMPANY, HANNA GERDE & MEADE, BALL EGGLESTON BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, ANN G. DAVIS and VAUGHAN, VAUGHAN & LAYDEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John F. Bodle
Stuart & Branigin
801 The Life Bldg.
P.O. Box 1010
Lafayette, IN 47902
(317) 423-1561

Counsel of Record

Stephen R. Pennell
Stuart & Branigin
801 The Life Bldg.
P.O. Box 1010
Lafayette, IN 47902

Counsel

Attorneys for Respondent, Floyd Wilcox

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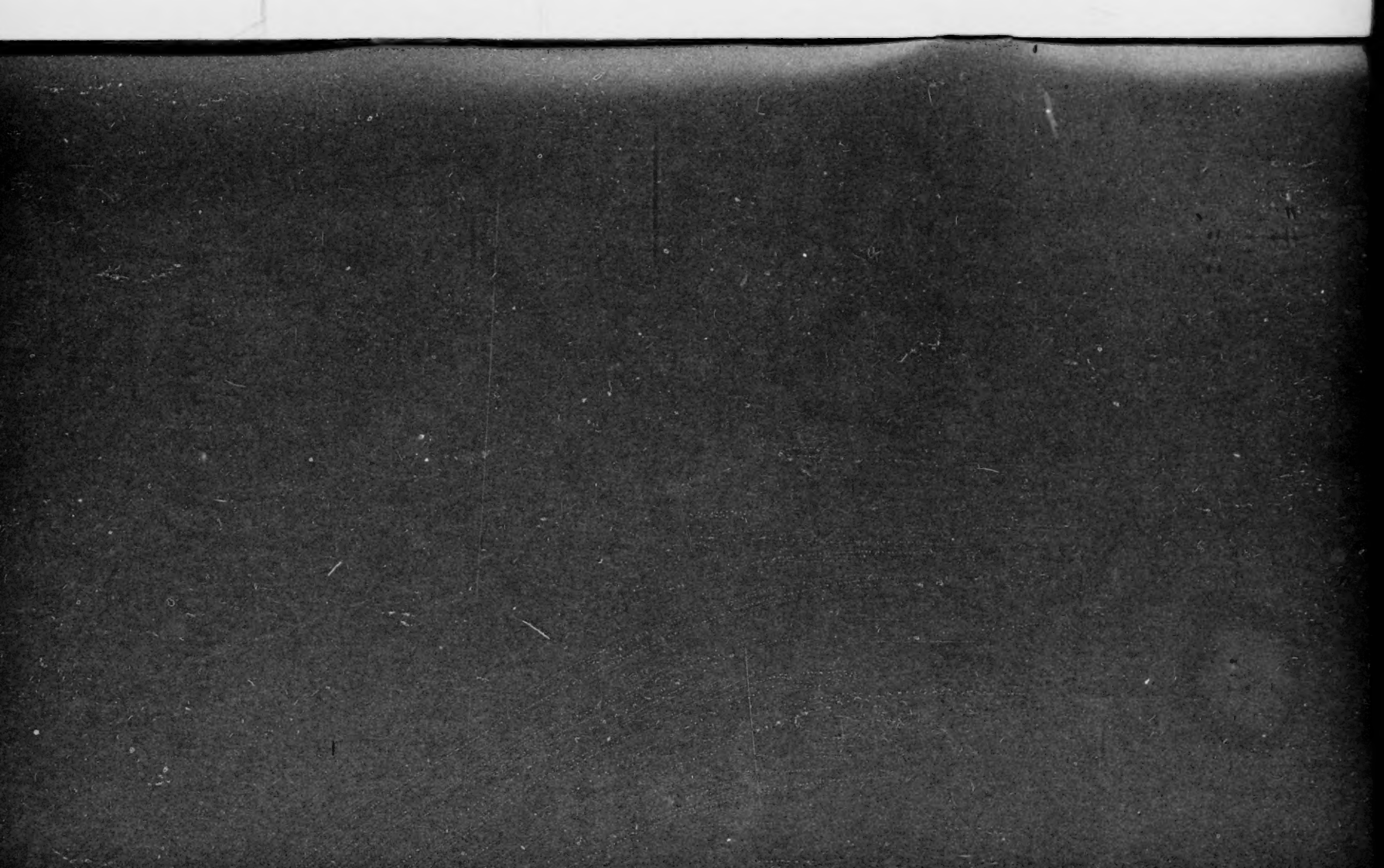

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GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioners (hereafter referred to collectively as "Harkrider") seek to invoke this Court's jurisdiction under 28 U.S.C. § 101. That statute, however, does not provide any basis for jurisdiction, and therefore Harkrider has failed to properly assert any basis for jurisdiction for his petition.

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STATEMENT OF THE CASE

Harkrider was sanctioned by the Indiana Court of Appeals and Supreme Court of Indiana for having brought an appeal which was not only frivolous, but was pursued in bad faith. The finding of Harkrider's bad faith was premised not only upon his violation of the rules of Indiana Appellate Procedure and abuse of the appellate process, but also on his misrepresentation of the record from the Court below. Harkrider's statement of the case here continues to make gross misstatements of fact and distortions of the record, thereby manifesting the bad faith in which even this appeal has been pursued.

The history of this long and tortured litigation began with the filing of a petition for appointment of guardian for Pearl Posey by Harkrider on June 30, 1981. (R. 9). On July 21, 1981, Floyd Wilcox (Wilcox) filed his cross petition for appointment of guardian. (R. 22). Although Harkrider contends in his statement of the case that this cross petition failed to conform to the requirements in I.C. 29-1-1-12, the only objection raised at the hearing on

July 21, 1981 to the cross petition was that it failed to give proper notice under I.C. 29-1-18-14. (R. 125). Thus, the objection which Harkrider attempts to raise now is different from the objection raised at trial.

The hearing on the appointment of a guardian was held on July 21 and 24, 1981. Evidence was presented on the manner in which the Posey farm was conveyed to Wilcox. Harkrider states at page 7 of his Petition that on November 9, 1977, Pearl Posey and Wilcox executed a document styled "Escrow Agreement" pursuant to which a deed to Pearl's eighty acre farm was placed in escrow to be transferred to Wilcox upon her death. This statement is the basis for the errors alleged in Harkrider's second question for review which asserts that the claim is "against a guardian who conveyed his ward's farm to himself. . . ." This is a gross misrepresentation of the record. Wilcox did not convey the Posey farm to himself nor did he execute any "Escrow Agreement" nor any other document causing it to be conveyed to him. The only documents pertaining to this transaction were a letter and deed prepared by an attorney and signed by Pearl Posey. (See R. 154, exhibit A included herein as Appendix A. The Appendix is being lodged with the Court under separate cover.) Mr. Bennett, the attorney who prepared the deed and suggested that the deed be placed in escrow until her death, testified that it was Mrs. Posey's idea to give the farm to Wilcox, and that this came as a surprise to Wilcox who went to Bennett's office expecting to purchase the farm on contract. (R. 219-221). Thus, there can be no justification for misrepresenting that Wilcox conveyed the property to himself when it is clearly apparent

from the record that the documents executed on November 9, 1977 were executed by Pearl Posey alone.

At the conclusion of the hearing on July 24, 1981, the Court entered an order appointing Lafayette Bank and Trust as guardian of Pearl Posey's estate. The Court was uncertain whether there was any need to have a guardian of the person appointed, and requested Ms. Davis, the Court appointed attorney for the ward, to investigate the matter and report back to the Court. (R. 382). Although Harkrider now objects that he was not given any notice of this report and had no opportunity to respond to it, he fails to note that he and his attorney were both present when the Court made this request of Ms. Davis and yet failed to raise any objection to this procedure. Ms. Davis reported that a guardian of the person was needed, a view shared by Harkrider, and the Court found that Wilcox should be appointed as guardian of the person instead of Mr. Harkrider.

Following the appointment of Lafayette Bank and Trust as guardian of the estate and Wilcox as guardian of the person, Harkrider took his first appeal to the Indiana Court of Appeals challenging this decision and virtually every other order entered by the Court which was adverse to him. The Court of Appeals affirmed the trial court in a memorandum decision filed on July 20, 1983. (Appendix B). The Court of Appeals denied Harkrider's claim that he was denied due process by not having notice or any opportunity to be heard on the question of the award of attorney's fees and other similar matters holding that such orders were not yet final appealable

orders, and that the time for raising any objection to such orders would be at the final accounting of the guardianship. The Court of Appeals further held that Harkrider did not have any property interest in the guardianship, and therefore was not entitled at that time to any notice. Furthermore, the Court of Appeals held that the trial court did not abuse its discretion under I.C. 29-1-18-17(d) by declining to give Harkrider notice of all matters affecting the guardianship. Harkrider then filed a Petition for Rehearing which was denied. He next sought transfer to the Indiana Supreme Court, but his petition was denied.

Pearl Posey died on March 19, 1982. Because the first appeal was still pending, the guardianship could not be closed and the guardianship assets could not be turned over to the ward's estate. It was therefore necessary for Wilcox as executor of the estate to petition the Court for funds to pay claims against the estate. Harkrider's characterization of all of these expenses being used to pay "fees" is a distortion of the record. On July 20, 1982 the Court directed a partial distribution be made to the estate in the sum of $5,000.00 to pay expenses of the estate such as the funeral and burial expenses of the ward. (Appendix C). The portion of this distribution which was not used to pay expenses is still a part of the estate. On March 11, 1983 the Court directed distribution be made to the estate in the sum of $19,939.57. This money was used to pay the Indiana inheritance tax for the estate. (Appendix D).

Harkrider's suggestion that he was denied due process by not being provided with notice and an opportunity for hearing on his objections to the attorneys' fees is also

incorrect. Although interim petitions for fees were still subject to review at the final accounting, Harkrider was even afforded an opportunity for a hearing on an Interim Petition for Attorneys' Fees which lasted two days due to the lengthy cross-examination of the guardian's attorneys by Harkrider. This hearing was held on April 9 and 12, 1984. (R. Vol. 4, pp. 968-1104). Although the trial court granted interim petitions for allowances of fees, these orders for allowances were not final until the hearing on the Final Accounting which was held on March 4, 1985. The attorneys for the guardians at that time presented evidence concerning their petitions for fees on which there had not yet been a hearing, the nature of services performed, the amount of time required to perform such services, and the standard hourly charges for such services. (R. Vol. 6). Mr. Harkrider and his attorney were both present during this hearing and cross-examined the guardian's attorneys at length regarding the amount of their fees. Thus, only after notice and a hearing in which Harkrider and his attorneys were present and were allowed to cross-examine the guardians' witnesses did the orders of the trial court become final.

After the trial court approved the final accounting on March 11, 1985, Harkrider then prosecuted his second appeal in this case. Harkrider claims he was never given any notice or opportunity to be heard on the issue of sanctions under A.R. 15(G). This is also untrue. In his appellee's brief, Wilcox raised the issue of whether Harkrider should be sanctioned under Indiana Rules of Appellate Procedure (A.R.) 15(G). That portion of Wilcox's brief which discussed the issue is included herein as Appendix E. Harkrider responded to this issue in his reply

brief, the pertinent portion of which is included herein as Appendix F. Harkrider did not file any motion with the Court of Appeals asking for a hearing on this issue.

On September 3, 1986 the Indiana Court of Appeals affirmed the trial court's approval of the guardian's final accounting. The Court of Appeals further held that Harkrider should be sanctioned pursuant to A.R. 15(G) for having undertaken and prosecuted the appeal which was not only frivolous but in bad faith. The Court of Appeals gave four reasons for its imposition of sanctions which were apparent from the record before it: 1) Numerous significant failures to observe the Indiana Rules of Appellate Procedure, 2) Absence of any mention of prior appeal, 3) Ignoring or omitting facts established in the record or misstatement of existing facts, and 4) Drafting his brief in a manner calculated to require the maximum expenditure of time by appellees and the Court.

Harkrider then filed a Petition for Rehearing in the Indiana Court of Appeals. (Harkrider's Appendix B). No error was asserted based upon any claim of denial of due process concerning the award of sanctions under A.R. 15(G). The Petition raised only one claim of constitutional error. In paragraphs 13(H) and 13(I) Harkrider asserted that his right to due process was violated as a result of unspecified ex parte rulings of the trial court and ex parte communications between appellee's counsel and the trial court. Other than the report to the Court by Ms. Davis, it is not clear to what rulings or communications Harkrider is referring. Harkrider's Petition for Rehearing cited to pp. 97-98 of his appellant's brief which referred to every order of the trial court since the litigation began,

including the order of the Court appointing Lafayette Bank and Trust as guardian of the estate, the order appointing Wilcox as guardian of the person, and the order approving the Final Accounting in the guardianship, all of which were conducted after a notice and opportunity to be heard in which Harkrider and his attorney appeared and were allowed to present their own testimony and other evidence.

Harkrider's Motion for Rehearing was overruled on October 14, 1986. He then filed his Petition to Transfer in the Supreme Court of Indiana. (Harkrider's Appendix D). Like the Petition for Rehearing in the Court of Appeals, no error was asserted based upon any claim of denial of due process by the imposition of sanctions under A.R. 15(G). Again, the only constitutional errors raised concerned alleged ex parte rulings and communications which were not specified with any particularity.

The Indiana Supreme Court granted Harkrider's Petition to Transfer and at the same time took up two other cases in which the question of sanctions under A.R. 15(G) was raised. The Indiana Supreme Court reversed the award of sanctions in the other two cases, *Orr v. Turco Manufacturing Co., Inc.*, 512 N.E.2d 151 (Ind. 1987); and *Lesher v. Baltimore Football Club,* 512 N.E.2d 156 (Ind. 1987), but affirmed the award against Harkrider finding "circumstances significantly more grave than mere lack of merit" and held that "gross abuse of the right to appellate review . . . should not go unrebuked." The Indiana Supreme Court remanded the cause to the trial court for an award of such attorneys' fees as may be determined to be appropriate. (Harkrider Appendix E). The Indiana

Supreme Court did not address any of the constitutional claims now raised by Harkrider.

Harkrider then filed his Petition for Rehearing in the Indiana Supreme Court. (Harkrider Appendix F). For the first time, Harkrider contended that the imposition of sanctions under A.R. 15(G) violated his constitutional right to due process. The Indiana Supreme Court denied Harkrider's Petition for Rehearing (Harkrider Appendix G) without addressing the constitutionality of the award of the sanctions under A.R. 15(G).

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ARGUMENT

THIS COURT LACKS JURISDICTION TO CONSIDER ANY ERROR CONCERNING CLAIMS OF DENIAL OF DUE PROCESS

The first error alleged by Harkrider is that the decisions of the Indiana Court of Appeals and the Indiana Supreme Court imposing sanctions pursuant to Indiana Rule of Appellate Procedure (A.R.) 15(G) violated his right to due process under the United States Constitution. Significantly, Harkrider failed to raise this issue before the Indiana Court of Appeals, and did not raise it in the Indiana Supreme Court until after that Court affirmed the decision of the Court of Appeals. By failing to properly present this issue to the Indiana Court of Appeals and the Supreme Court of Indiana, any error regarding the imposition of sanctions has been waived. The issue was not considered by the courts below and this Court therefore lacks jurisdiction to consider the issue.

The only claim of any denial of due process presented by Harkrider to the Indiana Supreme Court in his Petition to Transfer concerned certain alleged ex parte communications. By failing to make any objection to the Court's request to Ms. Davis that she make a report to the Court concerning the necessity of appointing a guardian of the person, Harkrider has waived any error concerning this procedure. By failing to present any cogent argument to the Indiana Court of Appeals concerning any other alleged ex parte communications, any error concerning such matters was also waived. Thus, the Indiana Supreme Court was not requested to address any constitutional claims which had not been waived. Accordingly, no constitutional claims of any alleged denial of due process were addressed by the Indiana Supreme Court.

Because the constitutional claims asserted by Harkrider in his Petition for a Writ of Certiorari were not properly raised before the Indiana Supreme Court and therefore were not addressed by that Court, there is no jurisdiction to grant Harkrider's Petition. This precise issue was recently considered by this Court in *Exxon Corporation v. Eagerton,* 462 U.S. 176, 103 S. Ct. 2296, 76 L. Ed. 2d 497, 504 (1983) in which the Court concluded that it had no jurisdiction to consider an issue which had not been decided by the Court below. Quoting *Street v. New York,* 394 U.S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) the Court observed that the decision below did not discuss this issue, and when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." See

also *Fuller v. Oregon*, 417 U.S. 40, 50 n.11, 40 L. Ed. 2d 642, 94 S. Ct. 2116 (1974); *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981); and *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), reh. den., 463 U.S. 1237, 77 L. Ed. 2d 1453, 104 S. Ct. 33 (1983). Thus, the constitutional claims which are asserted here were not ruled upon by the Indiana Supreme Court because those claims had been waived. Therefore, this Court has no jurisdiction to consider these claims.

HARKRIDER'S CONTENTION THAT HE WAS DENIED DUE PROCESS BY THE INDIANA COURT OF APPEALS AND SUPREME COURT'S DECISIONS TO IMPOSE SANCTIONS AGAINST HIM IS SO PLAINLY WITHOUT MERIT TO BE FRIVOLOUS

Harkrider's contention that he was never provided with any notice or opportunity to be heard on the issue of the imposition of sanctions is simply untrue. Furthermore, his contention that he was denied due process by not being given an evidentiary hearing is contrary to all precedent in which such sanctions have been imposed based upon conduct similar to that demonstrated by Harkrider during this appeal, which conduct is evident from the face of the record.

Although it is certainly true that due process requires that some notice and opportunity to be heard be provided before sanctions may be imposed, Harkrider cannot contend in good faith that he was not provided with any notice or opportunity to be heard before the sanctions were

imposed. The issue of whether Harkrider should be subject to sanctions was raised by Wilcox in his appellee's brief which was filed in the Indiana Court of Appeals on March 26, 1986. (Appendix E). This issue having been raised in the appellee's brief, Harkrider was put on notice that the Court of Appeals would consider this issue, and, if the Court of Appeals found in the appellee's favor, sanctions could be imposed. Harkrider was not only given the opportunity to respond to this issue, in fact, he did respond to this issue in his reply brief filed with the Indiana Court of Appeals. (Appendix F). Hence, Harkrider had notice of this issue and the opportunity to respond to it before any sanctions were entered against him. Harkrider's assertion at page 14 of his Petition that prior to the imposition of sanctions by the Court of Appeals, "there was no opportunity to respond to the bases it ultimately used" is clearly a misstatement of the record.

Moreover, not only was Harkrider provided with notice and an opportunity to be heard before the Court of Appeals imposed sanctions against him, Harkrider was afforded numerous opportunities to be heard on this issue after the Court of Appeals made its decision. As noted by the court in *Braley v. Campbell,* 832 F.2d 1504 (10th Cir. 1987), a petition for rehearing generally would be adequate to provide a party with an opportunity to respond to bring any errors to the court's attention. Harkrider was provided with three opportunities to be heard on this issue by briefs after receiving the Court of Appeals' decision holding that sanctions should be imposed against him. Opportunities to be heard were provided through the Petition for Rehearing in the In-

diana Court of Appeals, the Petition to Transfer to the Indiana Supreme Court, and the Petition for Rehearing in the Indiana Supreme Court. Furthermore, the fact that these were meaningful opportunities is evidenced by the fact the Indiana Supreme Court also considered two other cases on the question of the propriety of attorney's fees under A.R. 15(G) together wth Harkrider's Petition to Transfer, and the Indiana Supreme Court reversed the award of attorney's fees in both of the other cases. The award against Harkrider was affirmed because it was evident from the record before the Court that Harkrider's misconduct was so abusive and so flagrant that it should not go unrebuked.

Harkrider's contention that there is a constitutional right to an evidentiary hearing before sanctions can be imposed against him is totally without merit. Indeed, the United States Supreme Court has itself awarded damages under its Rule 49.2 without a hearing where it was apparent from the record that circumstances justified such an award. *See, e.g., Hyde v. Van Wormer,* 474 U.S. 992, 88 L. Ed. 2d 355, 106 S. Ct. 403 (1985), and *Tatum v. Regents of University of Nebraska-Lincoln,* 462 U.S. 1117, 77 L. Ed. 2d 1346, 103 S. Ct. 3084 (1983). Obviously if the United States Supreme Court has imposed sanctions without an evidentiary hearing, it may not reasonably be argued that due process mandates such a hearing.

The only authorities cited by Harkrider are not supportive of his position. Harkrider has misstated the holding of the court in *Braley v. Campbell,* 832 F.2d 1504 (10th Cir. 1987). The court did not reverse the grant of sanctions against an attorney because he was not given

a de novo evidentiary hearing to argue the original panel's imposition of sanctions as Harkrider claims. To the contrary, the court held that due process does not require an evidentiary hearing. "At the appellate level, the right to respond does not require an adversarial evidentiary hearing. (Citations omitted.) Even at the trial court level, the sanction inquiry may properly be limited to the record in most instances. (Citation omitted.)" 832 F.2d at 1515. The court in *Braley* concluded that a hearing may be necessary only if factual issues arise from the response of the sanctioned party affecting either the amount or whether sanctions should be imposed at all.

Harkrider has also misconstrued the court's holding in *Textor v. Board of Regents of Northern Illinois University,* 711 F.2d 1387 (7th Cir. 1983). In *Textor,* the court held that the district court erred in imposing fees without a prior hearing where there was a factual issue under Rule 11 whether counsel's conduct was indicative of bad faith sufficient to support such sanctions, or merely of incompetence. The court did not suggest that a hearing would be mandated where there was no such factual dispute observing that, "truly egregious conduct by counsel may support a finding of willful abuse without any inquiry about counsel's intent. . . ." 711 F.2d at 1395.

Harkrider has likewise misconstrued the court's holding in *Rogers v. Lincoln Towing Service, Inc.,* 771 F.2d 194 (7th Cir. 1985). Harkrider cites the case for the proposition that due process mandates an evidentiary hearing before sanctions may be imposed. The court did not hold that such a hearing is mandated or even suggest that a hearing is necessary in all cases; in fact, the court affirmed

an award of sanctions which had been imposed without hearing. The district court had imposed sanctions under Rule 11 without a hearing finding,

> "A hearing would serve no meaningful purpose since I imposed the sanction based on my conclusion that a majority of the claims made in the amended complaint were unreasonable as a matter of law. . . . There is no possible justification under an objective standard for loading down a complaint with worthless claims such as these, which are totally unsupported by even a single allegation of the complaint. The advisory committee's notes clearly contemplate that in some instances a district court will know enough about a particular pleading, without conducting a hearing, to decide it violates rule 11. . . . Due process does not demand a hearing to develop facts where the ruling is one of law and the facts adduced at the hearing would not alter the legal conclusion." 596 F. Supp., 13 at 27-28

The Court of Appeals affirmed holding, "we agree with the district court that the complaint was overblown and that a hearing would have served no useful purpose." 771 F.2d at 205.

This case is representative of how the drafters of Rule 11 intended for the rule to be applied in situations where the relevant facts are already of record, and due process does not require any further hearing. The Advisory Committee Comments indicate that although sanctions may not be imposed without due process, "In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." 97 F.R.D. 165, 201.

The Court of Appeals for the Seventh Circuit in *Hill v. Norfolk and Western Railway Company*, 814 F.2d 1192

(7th Cir. 1987) recently imposed sanctions sua sponte under Rule 38 of the Federal Rules of Appellate Procedure (which is the counterpart of Indiana Rule 15(G)). Consistent with its prior holding in *Textor,* the court held that due process does not mandate a hearing where the basis for the sanction appears from the record itself.

> But obviously the right to a hearing . . . is limited to cases where a hearing would assist the court in its decision. (Citations omitted.) Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments and briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the mental state of the attorney nor any factual issue is pertinent to the imposition of sanctions for such conduct. Where a hearing would be pointless it is not required, (citation omitted); hence "if there are no contested factual issues the district court can proceed summarily," (citation omitted), as we are doing here. . . . The text of Rule 38, and our previous decisions applying it, provide all the notice an attorney could reasonably demand that sanctions may be imposed on counsel directly for the making of frivolous legal arguments in this court—and imposed without a hearing, if there are no factual questions. . . . A hearing is required in a proceeding concerning sanctions only if there is a contested factual issue; there is not and cannot be one in this case.

814 F.2d at 1201-1203.

In *Szabo Ford Service, Inc. v. Canteen Corp.,* 823 F.2d 1073, 1082 (7th Cir. 1987) the Court held the District Court had erred in not awarding attorneys' fees as sanctions under Rule 11 observing, "The violation being established on the legal record, a hearing is unnecessary." The

most recent decision on point in the Seventh Circuit also imposed sanctions without prior notice of a hearing pursuant to Fed. R. App. P. 38 for the same misconduct as Harkrider which included filing briefs replete with misrepresentations. See *Fox Valley AMC/Jeep, Inc. v. AM Credit Corp.*, 836 F.2d 366 (7th Cir. 1987). It is therefore plainly frivolous for Harkrider to rely upon cases from the Seventh Circuit in support of his contention that A.R. 15(G) is unconstitutional for not mandating a hearing before sanctions may be imposed when the Seventh Circuit has held on numerous occasions that due process does not require any hearing and has itself imposed sanctions for a frivolous appeal without notice or hearing for the same form of misconduct which has been demonstrated by Harkrider.

It is apparent from the decisions of the Indiana Court of Appeals and the Indiana Supreme Court that all of the relevant misconduct which formed the basis for the conclusion that Harkrider's appeal was in bad faith was contained in Harkrider's own briefs, and there were no additional factual issues pertinent to the imposition of sanctions for such misconduct. Harkrider's bad faith was found from 1) the disregard of the form and conduct requirements of Indiana Rules of Appellate Procedure 8.2 (A)(1), 8.3(A)(4), 8.3(A)(5), and 8.3(A)(7); 2) his omission and misstatement of the facts established in the record; 3) the brief was written in a manner calculated to require the maximum expenditure of time by both appellees and the court; and 4) the failure to disclose properly his previous appeal raising many of the same issues and attempt to relitigate many of these same issues even

though they had been decided adversely to him in the prior appeal.

Harkrider does not assert in his Petition that there was any error regarding the first three of these grounds for imposition of sanctions, but contends that the Supreme Court's finding that his failure to disclose his previous appeal was "blatantly erroneous." This argument distorts the basis for the Court's finding. The Indiana Rule of Appellate Procedure 8.3(A)(4) requires that the appellant's brief contain a statement of the case. The statement of the case contained in Harkrider's appellant's brief totally failed to mention the fact that there had been a prior appeal in this case which he lost. Although the Court of Appeals could have discovered that the prior appeal had been undertaken from Harkrider's motion to include the prior appeal in the record of the second appeal, it was Harkrider's own failure to bring properly the fact the appeal had been taken to the court's attention and the manner in which he totally ignored the prior decision of the Court of Appeals which led to the finding that he had failed to disclose his previous appeal. Harkrider's attempt to raise and argue many issues which had been decided against him on the prior appeal as though they had never before been decided was clearly inexcusable and demonstrated bad faith.

Not only has Harkrider misstated or misconstrued the holdings of the cases cited in his Petition as well as distorted the facts in the record, he has also ignored those cases which have held that there is no constitutional right to a hearing on whether sanctions should be opposed or what level of sanctions should apply. In *Toepfer v. De-*

partment of Transportation, FAA, 792 F.2d 1102 (D.C. Cir. 1986) the court imposed sanctions under Fed. R. App. P. 38 without a hearing holding, "To require a hearing for the assessment of such damages and costs would impose on the opposing party and on the court an even greater burden in dealing with a frivolous appeal and entirely defeat the purpose of Rule 38." 792 F.2d at 1103. *See also, McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987); and *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984), cert. den. 469 U.S. 1189, 83 L. Ed. 2d 965, 105 S. Ct. 959 (1985). Sanctions have been imposed without a hearing in numerous other cases in which certiorari has been denied. *See, e.g., Hilgeford v. Peoples Bank*, 776 F.2d 176 (7th Cir. 1985), cert. den., 475 U.S. 1123, 90 L. Ed. 2d 188, 106 S. Ct. 1644 (1985); *Trecker v. Scag*, 747 F.2d 1176, 1179 (7th Cir. 1984), cert. den., 471 U.S. 1066, 85 L. Ed. 2d 498, 105 S. Ct. 2140 (1985); *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 517 (2nd Cir. 1985), cert. den., 474 U.S. 1032, 88 L. Ed. 2d 573, 106 S. Ct. 593 (1985); *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir. 1984), cert. den., 469 U.S. 1018, 83 L. Ed. 2d 359, 105 S. Ct. 433 (1984); *United States v. Carley*, 783 F.2d 341 (2nd Cir. 1985), cert. den., — U.S. —, 90 L. Ed. 2d 697, 106 S. Ct. 2251 (1986); and *George v. State of Texas*, 788 F.2d 1099 (5th Cir. 1986), cert. den., — U.S. —, 93 L. Ed. 2d 153, 107 S. Ct. 226 (1987).

It is clear from these authorities that due process does not require an evidentiary hearing before sanctions may be imposed where the grounds for the imposition of such

sanctions are apparent from the record itself. In the present case, bad faith was evident from Harkrider's own briefs which misstated the facts, failed to give an honest statement of the case, abusively failed to comply with the rules of Appellate Procedure, and were done in such a manner as to oppress and harrass the appellees by requiring the maximum expenditure of time by both appellees and the Court. A hearing under such circumstances would serve no meaningful purpose. Likewise, the Petition for Writ of Certiorari misstates the facts, distorts the basis for the decisions of the Indiana Court of Appeals and the Supreme Court, and either misstates, misconstrues, or ignores the judicial decisions on this issue. Like the prior appeals, this appeal is frivolous and constitutes a glaring example of abuse of the judicial process.

HARKRIDER WAS GIVEN DUE PROCESS IN THE CONDUCT OF THE PROCEEDINGS

Assuming arguendo that this Court has jurisdiction to consider Harkrider's claims of denial of due process in the conduct of the proceedings in the trial court, it is clear that no denial of any right of due process occurred. Harkrider's statement of the question presented for review is so general and vague as to be incomprehensible. Rather than addressing any specific incident or order, the question broadly asserts that the entire conduct of proceedings operated to deny him due process. Such an assertion is patently absurd.

Harkrider had notice and an opportunity to be heard on the matter of the selection of a guardian. He exercised his right to appeal the Court's order appointing

persons to serve as guardians who were not favored by Harkrider as well as virtually every other order against him. After losing in the Court of Appeals he sought review by the Indiana Supreme Court which was denied. The case then returned to the trial court where Harkrider continued to contest virtually every petition by the guardians and efforts to administer the guardianship. There was a hearing which took two days to conclude on an Interim Petition for Attorneys' Fees at which time Harkrider was present and was allowed to cross-examine the guardian's attorneys on their fees. Any interim orders of the Court which were entered ex parte remained interlocutory until the hearing on the final accounting. Harkrider filed an objection to the final accounting. A hearing was conducted on his objections at which time Mr. Harkrider and his counsel were present and were allowed to present their own evidence and cross-examine the witnesses called by the guardians. Harkrider again exercised his right to appeal from the order approving the final accounting over his objection in which he raised over fifty grounds for error. His appeal was heard by both the Indiana Court of Appeals and the Supreme Court of Indiana. To argue that Harkrider was not given due process after having dragged this litigation through the Indiana courts for the past seven years during which there have been several hundred pleadings, motions and memoranda filed in the trial courts, numerous hearings, and two appeals completely through the Indiana Court of Appeals and the Indiana Supreme Court is plain nonsense.

To the extent that specific arguments have been made, they are plainly without merit. Harkrider persists in

arguing that I.C. 29-1-18-17 entitled him to notice. The argument continues to ignore the holding of the Court of Appeals from the first appeal, as the Court specifically found that Harkrider was not entitled to notice under I.C. 29-1-18-17. Furthermore, even if Harkrider was entitled to notice, no orders became final without notice and a hearing provided to Harkrider.

Harkrider's contention that the Court ignored the statutory order of preferences in the selection of guardians under I.C. 29-1-18-10 is also false. The Court did not ignore Mr. Harkrider's desire to be appointed as guardian. To the contrary, the Court specifically found that Mr. Harkrider was not suitable to be appointed because of ill feelings between the ward and Mr. Harkrider. (R. 380.)

Harkrider's claim that the trial court ignored the notice provision in I.C. 29-1-18-11(e) is likewise without merit. That statute merely requires that the petition for appointment of a guardian identify the person whose appointment is sought. Wilcox's petition did exactly that by requesting that Wilcox and a corporate fiduciary besides Purdue National Bank be appointed guardian. Moreover, the statute does not require that the court appoint any of the persons requested for appointment in any of the petitions.

Harkrider's claim that insufficient notice of the hearing was given under I.C. 29-1-1-12 is also specious. The hearing on the selection of a guardian was held on July 24 which was more than ten days after Harkrider's petition was filed. The statute does not require a continuance of the hearing for an additional ten days if a notice of objections to the original petition or a cross petition is

filed. It is further provided in I.C. 29-1-18-14 that the notice period may be reduced to as little as three days. Harkrider had notice of Wilcox's petition three days before the hearing, but did not request a continuance of the hearing or raise any objection for insufficiency of notice under I.C. 29-1-1-12. Moreover, Harkrider did not make any objection at the hearing based on improper notice under I.C. 29-1-1-12.

Harkrider incorrectly asserts that the Court appointed Wilcox despite previously stating that he was incompetent to serve. The record clearly shows the Court's statement was addressed only to Wilcox's proposed appointment as guardian of the estate; the Court did not suggest that Wilcox was incompetent to serve as guardian of the person. Thus, here again, Harkrider's assertion is a gross distortion of the record. Harkrider quotes only a portion of the Court's remarks and omits that portion of the text in which the Court found that the ward and Mr. Wilcox had enjoyed a good personal relationship for many years and that the ward had "expressed great confidence" in Mr. Wilcox and "presumably would like for him to continue to handle her affairs." (R. 380. Appendix G.) Thus, when placed in context, it is apparent that the trial court believed that Mr. Wilcox was competent to serve as guardian of the person. Harkrider's assertion that the trial court made a finding that Wilcox was incompetent to serve as guardian in any capacity is a complete fabrication.

These perceived errors were argued by Harkrider in his first appeal to the Indiana Court of Appeals which was decided against him. He then sought review of these errors to the Indiana Supreme Court, but his Petition for Transfer was denied. If there had been any errors of a

constitutional magnitude in the selection of Mr. Wilcox to act as guardian of the person, Harkrider should have sought certiorari on those issues after the Indiana Supreme Court had denied his Petition to Transfer, but he did not. Harkrider's attempt to relitigate these same issues again years later in the second appeal is but further evidence of the frivolous nature of this appeal and abuse of the judicial process.

HARKRIDER SHOULD BE SUBJECT TO FURTHER SANCTIONS

Since successfully defending the award of sanctions by the Indiana Court of Appeals in the Indiana Supreme Court, Wilcox has now had to incur additional attorneys' fees and expenses in opposing Harkrider's Petition for Writ of Certiorari. Given the circumstances of this appeal, it is only appropriate and just that the case be remanded to the Indiana courts for an award of such additional fees and expenses as may have been incurred in defending this Petition pursuant to Supreme Court Rule 49.2. This Petition for Writ of Certiorari, like the proceedings from which it was taken, is frivolous and vexatious. It has succeeded only in delaying the payment of the attorneys' fees and expenses previously awarded and in forcing Wilcox to defend one more insubstantial appeal.

This precise issue was considered by the court in *United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984). That case also involved a frivolous appeal from an award of sanctions from having prosecuted proceedings which were frivolous and vexatious. Observing that the "frivolous appeal of a sanction for bringing frivolous

litigation borders on abuse of process," the court ordered the appellants' attorney to pay the costs for attorneys' fees on the appeal under 28 U.S.C. § 1927, and further ordered that the appellants would be assessed double costs under Fed. R. App. P. 38. See also *Good Hope Refineries, Inc. v. R.D. Brashear,* 588 F.2d 846, 848 (1st Cir. 1978).

A similar result was reached by the court in *In re Peoro,* 793 F.2d 1048 (9th Cir. 1986). The district court assessed attorneys' fees and affirmed a bankruptcy court order, doing so under 28 U.S.C. § 1927, due to the vexatious multiplication of the proceedings. Affirming the award, the Court of Appeals observed that the facts of the case presented a textbook example of the use of litigation to bludgeon opponents into submission. The court further ordered that the appellant would be liable for the appellee's reasonable attorneys' fees incurred in having to defend the appeal under F. R. App. P. 38 holding, "[W]e think it appropriate to assess double costs and attorneys' fees against Eisenman for this appeal. He has presented only frivolous arguments. We view this appeal as just another stage in his long abuse of the federal judicial system." 793 F.2d at 1052.

A similar result was reached by the court in *Westmoreland v. CBS, Inc.,* 770 F.2d 1168 (D.C. Cir. 1985). The Court of Appeals held that the district court had erred in not awarding sanctions under Rule 11. The court further held that the appellant would be entitled to his attorneys' fees on appeal. Discussing the policy for its decision, the court observed that it is very possible that appellate expenses and fees might substantially exceed the sanctions in the court below, thus forcing many liti-

gants to conclude that vindication is not worth the effort. Given the purpose of Rule 11 to deter groundless litigation, litigants who succeed on appeal in enforcing such sanctions should not then have to bear the costs of such an appeal.

It is all too evident from Harkrider's brief which misstates both the facts and the law that this further effort at appeal is likewise frivolous and in bad faith. Like the *Peoro* case, this appeal is just another stage in the long abuse of the judicial system. The Indiana Supreme Court concluded that such abuse should not go unrebuked. If Harkrider is to be deterred from continuing to pursue this litigation in bad faith, Harkrider should be required to bear the additional fees and expenses incurred by Wilcox in having to defend yet another frivolous appeal.

CONCLUSION

For the reasons discussed, Wilcox would respectfully request this Court to dismiss this Petition for Writ of Certiorari for lack of jurisdiction or in the alternative, to deny this writ. Wilcox would further respectfully request this Court to order that additional sanctions be imposed against Harkrider pursuant to Rule 49.2 of the Rules of the United States Supreme Court in an amount to be determined by the Indiana courts below, and such other sanctions as this Court may deem appropriate.

Respectfully submitted,

Stephen R. Pennell

John F. Bodle